

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DONALD HOBBS**

Claimant

VS.

**SYSCO FOOD SERVICE, INC.**

Self-Insured Respondent

Docket No. 1,026,955

**ORDER**

Respondent and Claimant requested review of the February 28, 2007 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on June 5, 2007.

**APPEARANCES**

Dennis L. Horner, of Kansas City, Kansas, appeared for the claimant. Mark E. Kolich, of Lenexa, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agree that the medical records attached to the preliminary hearing transcript are to be considered part of the record on appeal. Moreover, respondent agrees that if the claimant's injury is found compensable and the Board declines to adopt the ALJ's reasoning with respect to the medical expenses associated with claimant's shoulder injury, respondent should then be found responsible for all of the medical bills itemized in the record, subject to the statutory fee schedule. Finally, respondent also agrees that if this claim is found compensable, claimant is entitled to the temporary total disability benefits as awarded by the ALJ.

**ISSUES**

After considering all of the evidence, the ALJ concluded claimant injured his right shoulder by an accident that arose out of and in the course of his employment with the

respondent on July 29, 2005, and he provided timely notice of the accident. Accordingly, the ALJ awarded claimant 42.39 weeks of temporary total disability benefits, an 11.5 percent permanent partial impairment of the right shoulder, as well as payment of the authorized medical expenses and an additional \$500 in unauthorized medical allowance.

The respondent requests review of the compensability of claimant's alleged injury. Put simply, respondent challenges the ALJ's conclusion as to whether claimant sustained an accidental injury by accident arising out of and in the course of his employment. Respondent maintains shortly before claimant's alleged accident, he sought treatment for pain in his right shoulder. And based upon the testimony of other employees, the accident claimant described could not have occurred in the manner claimant describes. Respondent adds that the ALJ's conclusion that claimant's version of the accident was "plausible" does not satisfy his evidentiary burden. Thus, respondent urges the Board to deny claimant's claim based upon a failure to satisfy his burden of proving a compensable claim.

Claimant requests review of the ALJ's decision to decline payment of medical treatment he contends was wrongfully denied by the respondent. Claimant also maintains that the ALJ should have found a higher permanent impairment rating based upon the testimony of Dr. Edward Prostic.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ accurately set forth the factual background relating to this claim and the Board adopts that statement as its own. The determinative issue in this appeal is whether claimant established an accidental injury arising out of and in the course of his employment on July 29, 2005. There is no dispute that he sustained a right rotator cuff tear and that the injury required surgery and followup therapy. But the source of that injury is at the heart of this dispute.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>1</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>2</sup>

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<sup>1</sup> K.S.A. 2005 Supp. 44-501(a).

<sup>2</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising “out of” and “in the course of” employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.<sup>3</sup>

There is no dispute that if an accident occurred, it arose out of claimant’s employment, as he was in the process of loading a truck during his regular work day. The dispute lies in whether claimant has established that an accident occurred while in the course of his employment.

Respondent contends that the circumstances surrounding the alleged accident, as described by claimant, do not exist and thus, the accident could not have occurred. Simply put, respondent maintains that the container claimant was loading was not cold enough to have frozen, thus claimant could not have injured his shoulder while reaching for a frozen packing strap as alleged. And respondent also points to claimant’s pre-accident visit to his personal physician where he complained of right shoulder pain as further evidence that the injury did not occur at work.

The ALJ considered this evidence and concluded as follows:

It is plausible that this trailer may have cooled to the point of freezing before it was loaded. The trailer was intended to be cooled to below freezing. There was no evidence to directly contradict the claimant’s observations about this trailer, and nothing to indicate the claimant was mistaken or untruthful in his testimony.

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. . . In this case, the preponderance of the evidence indicated that the claimant had a weakened right rotator cuff before July 29, 2005, but that on that date his work activity of pulling on the strap worsened the rotator cuff to the point

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<sup>3</sup> *Id.* at 278.

that it tore. It is held that the claimant injured his right shoulder out of and in the course of his employment with the respondent.<sup>4</sup>

The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and at least one of respondent's representatives testify in person. In granting claimant's request for medical treatment and temporary total disability benefits, both at the preliminary hearing level and following the Regular Hearing, the ALJ apparently believed claimant's testimony over that offered by the respondent. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. While it is unfortunate that the ALJ used the term "plausible" in connection with the sufficiency of the evidence, nonetheless it is clear that the ALJ fully considered both parties' contentions and weighed them against the other. Accordingly, the Board affirms the ALJ's finding that claimant established that it is more likely true than not that he sustained an accidental injury to his right shoulder on July 29, 2005, when he pulled on a frozen or trapped strap while in respondent's employ.

Although claimant complained of previous shoulder pain, he testified that following his accident, he felt pain that was far more intense and immediate. Thus, the Board is persuaded that it was his accident that gave rise to the ultimate rotator cuff tear.

The remaining issue to be determined stems from the ALJ's decision to deny claimant's request for payment of certain medical bills incurred as a result of his shoulder surgery. To the extent that any of claimant's treatment was authorized, following a preliminary hearing, those bills were ordered paid. However, there are a number of bills that claimant incurred before the preliminary hearing, as he had surgery before he retained an attorney and filed his written claim.

The Workers Compensation Act compels a respondent to provide medical treatment that is reasonably intended to cure and relieve an injured employee of the effects of a compensable injury.<sup>5</sup> With that obligation comes the right to designate the authorized treating physician. Only when a respondent fails and/or refuses to provide medical treatment is a claimant permitted to select a physician to direct his or her care.<sup>6</sup> And in that instance, the employer will be held responsible for the claimant's medical care.<sup>7</sup>

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<sup>4</sup> ALJ Award (Feb. 28, 2007) at 3.

<sup>5</sup> K.S.A. 44-510h(a).

<sup>6</sup> K.S.A. 44-510j(h).

<sup>7</sup> *Id.*

The ALJ seemed to employ an unusual standard of review on this issue and concluded: "The respondent had an understandable reason to doubt its liability, so it does not appear the respondent was unreasonable in its refusal to provide treatment."<sup>8</sup> The Act does not allow a respondent to escape liability for medical bills associated with a compensable claim merely because its denial is not unreasonable. Moreover, denial of the claim was not respondent's only course of action. The Act provides for reimbursement for monies paid when a claim is ultimately found noncompensable.<sup>9</sup> This provision furthers the Act's goal of prompt treatment and payment of medical bills pending a full resolution of the claim. Accordingly, the Board reverses the ALJ's Award on the issue of medical bills and finds that respondent is liable for those expenses itemized within the record, subject to the statutory fee schedule.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated February 28, 2007, is affirmed in part and reversed in part as follows:

The Board affirms the ALJ's legal conclusion that claimant established that it is more likely true than not that he sustained an accidental injury to his right shoulder on July 29, 2005, and affirms the ALJ's finding that claimant had an 11.5 percent permanent partial disability of claimant's right shoulder.

The Board reverses the ALJ's finding that respondent was not liable for payment of medical bills incurred before the preliminary hearing and orders respondent to pay all reasonable and related medical expenses itemized within the record, and subject to the statutory fee schedule.

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<sup>8</sup> ALJ Award (Feb. 28, 2007) at 4.

<sup>9</sup> K.S.A. 44-534a(b).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant  
Mark E. Kolich, Attorney for Self-Insured Respondent  
Kenneth J. Hursh, Administrative Law Judge